IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-44

BARNES & TUCKER COMPANY,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE NATIONAL COAL ASSOCIATION, THE NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION, THE KEYSTONE BITUMINOUS COAL ASSOCIATION, AND THE AMERICAN MINING CONGRESS, AS AMICI CURIAE

FOR AMICI CURIAE THE NATIONAL COAL ASSOCIATION, THE NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION, AND THE AMERICAN MINING CONGRESS

JOHN L. KILCULLEN
Kilcullen, Smith & Heenan
1800 M Street, N.W., Suite 600N
Washington, D.C. 20036
(202) 296-5700

FOR AMICUS CURIAE THE KEYSTONE BITUMINOUS COAL ASSOCIATION

HAROLD R. SCHMIDT
Rose, Schmidt, Dixon, Hasley & Whyte
9th Floor, Oliver Building
Pittsburgh, Pennsylvania 15222
(412) 434-8600

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The National Coal Association, the National Independent Coal Operators' Association, the Keystone Bituminous Coal Association, and the American Mining Congress herewith respectfully request leave to file their attached brief as *amici curiae* in support of the Jurisdictional Statement filed by appellant herein.

These respective associations, and their members, have a direct and urgent interest in the issues presented here. The decision of the Pennsylvania Supreme Court from which this appeal is taken deals with new and previously uncharted areas

respecting the exercise of State power to retroactively apply recently adopted environmental laws to inactive mine properties which were abandoned prior to enactment of such laws.

While these issues are effectively treated in appellant's Jurisdictional Statement, it is the purpose of this *amicus* brief to convey to the Court the far-reaching consequences which may radiate from the decision of the Court below. If the power of a state to retroactively impose economic liability upon an industry is not governed and controlled by reasonable rules of due process the ability of the managers of an enterprise to make sound and rational decisions respecting conduct of its affairs becomes impossible. It is hardly necessary to emphasize that the vigor of the national economy requires an industrial climate which encourages adequate capital investment for development of natural resources. When a state, as in this case, by retrospective legislation imposes unreasonable and unduly oppressive economic burdens upon one of its most essential industries the industry must look to this Court for a determination as to whether the state action constitutes a taking of property without due process of law.

Counsel for *Amici* has obtained the consent of the appellant for the filing of this *amicus curiae* brief, but the Assistant Attorney General of Pennsylvania has declined to grant consent.

Respectfully submitted,

FOR AMICI CURIAE THE NATIONAL COAL ASSOCIATION, THE NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION, AND THE AMERICAN MINING CONGRESS

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INTERESTS OF AMICI CURIAE

The National Coal Association is a voluntary nonprofit association representing coal mining companies which produce almost one-half of the annual coal production in the United States. The National Independent Coal Operators Association is a nonprofit association of small and medium-sized coal producers located primarily in the Appalachian coal regions of

Pennsylvania, West Virginia, Kentucky, Ohio and Virginia. The Keystone Bituminous Coal Association is a nonprofit association representing coal mining companies operating in the State of Pennsylvania. The American Mining Congress is a nonprofit association comprised of mining companies which produce a major proportion of the nation's minerals, including coal, metals, and non-metallic industrial and agricultural minerals. The basic purpose of *amici* is to represent the interests of the mining industry and to cooperate with public authorities in dealing with problems that affect mining.

The issues which are involved here have broad implications for the mining industry as a whole. From the standpoint of the industry it is important that the Court provide answers to the question of whether and to what extent a state may, under newly-adopted environmental statutes, impose upon a mining company the obligation to abate post-mining conditions which develop and manifest themselves years after mining operations have ceased, and which are not attributable to fault or negligence of the mine operator.

•

THE QUESTIONS ARE OF GREAT IMPORTANCE TO THE MINING INDUSTRY

For well over a hundred years mining practices in Pennsylvania, as well as in other states, were carried on in accordance with statutory standards and social, political and governmental policies which permitted, and, indeed affirmatively sanctioned the discharge of mine waters into streams and waterways which were not the source of public water supplies.[1]

[1] See, e.g. *Pennsylvania R.R. v. Sagamore Coal Co.*, 281 Pa. 233, 126 A.386 (1924).

In the mid 1960's a shift in public attitudes resulted in a rewriting of the established body of laws and enactment of legislative changes which have imposed a multitude of new environmental standards upon industry generally, and the mining industry in particular. As a consequence, environmental considerations are a controlling factor in every management decision which a mining company must make in respect to its day-to-day operations, as well as in planning for its future activities.

This is not to say that it should not be so. But it is important that those who have responsibility for such management decisions should know the rules of the game, and that they should have some assurance that a course of action which they follow in reliance upon existing laws and regulations will not later bring down upon them unforeseen liabilities of disastrous proportions because the state later changes the rules or imposes new duties by subsequent legislative acts.

Put in another way, there has been a shifting perspective between what was permissible and even welcome during periods when the state was actively encouraging development of its mineral resources, and what is permissible and welcome in 1977. The benefits which the state and its citizens derived from industrial development were almost universally regarded during past periods as justifying and outweighing incidental damage to the air, land or water, but today the conditions which followed as a consequence of these past governmental policies are now being classified as public nuisances which a mining company must abate at enormous and unanticipated cost.

The question is not whether the legislatures have gone too far or too fast in their efforts to protect the environment, it is rather a question of whether under newly-adopted environmental laws a state may require a company to take action to abate conditions arising out of past industrial

activities which were in all respects legal and proper at the time they took place, where there was full compliance with then-existing statutory requirements and standards, and where no fault or negligence, or foreseeability can be attributed to the company.

IT IS IMPORTANT TO DEFINE THE PARAMETERS WITHIN WHICH A STATE MAY, BY POST-FACTO LEGISLATION, REQUIRE ABATEMENT AS A PUBLIC NUISANCE THAT WHICH WAS REGARDED AS LAWFUL AND ACCEPTABLE AT THE TIME ACTIVE MINING OCCURRED.

There is a pressing need for clarification of the constitutional limits of a state's power to require mining companies, or other industrial enterprises, to return to old and abandoned facilities and, regardless of cost, abate conditions which were theretofore not recognized or considered as public nuisances or contrary to the general welfare of the state and its citizens.

The situation presented in this case typifies the problem. Under the established legal and public policy considerations which prevailed in Pennsylvania prior to the most recent amendments to the Clean Streams Law, Act of June 22, 1937, as amended, 35 P.S. sec. 69.1 et seq., the discharge of acid mine drainage into streams was not recognized as a nuisance, either public or private. The controlling public policy of the state during previous periods was expostulated in the landmark case of *Pennsylvania Coal Company v. Sanderson*, 113 Pa. 126, 6 A.453 (1886) in which the Court said:

> "The right to mine coal is not a nuisance in itself. It is a right incident to the ownership of coal property, and when exercised in the ordinary manner and with due care the owner cannot be held for permitting the natural flow of mine water over his own land, into the water course, by means of which the natural drainage of the country is effected.
>
> * * *
>
> The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends; the discharge of the water is therefore part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the state.
>
> The defendants were engaged in a perfectly lawful business, in which they had made large expenditures, and in which the interests of the entire community were concerned; they were at liberty to carry on that business in the ordinary way, and were not, while so doing, accountable for consequences which they could not control; as the mining operations went on, the water by the mere force of gravity ran out of the drifts and found its way over the defendant's own land to the Meadow Brook. It is clear that for the consequence of this flow, which by the mere force of gravity, naturally, and without any fault of the defendants, carried the water into the brook and thence to the plaintiff's pond, there could be no responsibility as damages on the part of the defendants." 113 Pa. at 146-47, 6 A. at 457.

Only where it could be shown that the discharge of acid mine drainage entered into a "pure stream" which was the source of a community's water supply, did the Pennsylvania courts recognize the existence of a public nuisance. *Pennsylvania Railroad v. Sagamore Coal Company*, 281 Pa. 233, 126 A. 386 (1924).

In the present case there was no showing that the drainage from Mine No. 15 entered "clean streams", but rather entered waters which were already heavily polluted by sewage and drainage from other mines. As noted by the court in the Second Commonwealth Court Opinion (App. 65)

"The waters of the Commonwealth here in question are and for a long period of time have been polluted by sewage and acid mine drainage from closed or 'abandoned' mines. Except for some developing recreational uses there is no evidence that these waters in their polluted state are used for public purposes. Nor do we have in this case facts supporting concepts of negligence, foreseeability or unlawful conduct, being elements of seemingly persuasive force in some of the cases.

* * *

For better than one hundred years the State has chosen to regulate mining and there is no credible evidence in this case that Mine No. 15 was not operated and eventually closed consistent with statutory law, regulation or licenses issued pursuant thereto."

The Second Commonwealth Court Opinion also presents a review of the applicable statutory and regulatory provisions enforced by the State of Pennsylvania during the respective periods the mine was in active operation. (App. 32-39). Briefly summarized, the statutes governing mine drainage are described as follows:

The initial Pennsylvania statute dealing with pollution of streams, which was known as the Purity of Waters Act of 1905, dealt with the discharge of sewers into the waters of the Commonwealth, but significantly provided in section 4 that it was not to apply to "waters pumped or flowing from coal mines." App. 32.

A 1923 statute which empowered the Department of Health to promulgate regulations for the protection of the water supply and prevent pollution, specifically provided that it was not to apply to ". . . any pollution or contamination caused by or resulting from water pumped from or flowing from coal mines or water used in the preparation of coal." Ibid.

The Clean Streams Law enacted in 1937 expressly excluded from the prohibition on industrial wastes ". . . acid mine drainage from coal mines . . ." App. 33.

In 1945 the Clean Streams Law was extensively amended so as to include coal mines within its coverage, and to prohibit discharge of acid mine drainage into "clean waters", with the proviso that ". . . the provisions of this article shall not apply to acid mine drainage from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties of such drainage shall become known." Ibid. Coal mines were required, however, to submit a proposed drainage plan to the Sanitary Water Board for approval.[2]

It is important to note that these statutory provisions dealt only with discharge of acid mine drainage into "clean" waters. It was not until the adoption of the 1965 amendments to the Clean Streams Law that the different treatment accorded the discharge of acid mine drainage into "clean" and "unclean" waters was eliminated, and the Sanitary Water Board was given regulatory powers over all such discharges.

On July 31, 1970, a full year after Mine No. 15 was permanently sealed in accordance with applicable law, the Clean Streams Law was again amended to provide, in pertinent part, that

"A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966, under circumstances requiring a permit from the Sanitary Water Board under the provisions of Section 315(b) of this act as it existed under the amendatory act of August 23, 1965. (P.L. 372)."

This amendment also transferred the powers of the Sanitary Water Board to the Department of Environmental Resources, which agency proceeded to retroactively revoke the permits which had been issued to Barnes and Tucker with respect to

[2] Barnes and Tucker fully complied with this requirement, and was issued permits by the Sanitary Water Board. (App. 78, 79).

discharge of water from Mine No. 15, and brought suit to compel the company to continually treat, in perpetuity, not only the natural percolation from Mine No. 15, but also millions of gallons of water which flow through the mine from other active mines located at higher elevations.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT RAISES SERIOUS DUE PROCESS QUESTIONS.

In holding Barnes & Tucker liable under statutes adopted after its mining operations had ceased, the Pennsylvania Supreme Court reasoned that the 1965 amendments to the Clean Streams Law put the company on notice that its mine drainage permits were subject to change and that the applicable statutory authority for its permits might later be amended, and, accordingly, Barnes and Tucker was forewarned that amendments might be passed after the mine was closed which would subject it to liability. First Pennsylvania Supreme Court decision, App. 95.

This reasoning of the Court is deficient in at least two respects. First, there was essentially no due process notice as to what the amended law would be. Even a statute which is actually on the books must be sufficiently clear so as to provide notice of what conduct is proscribed. See, *Rabe v. Washington*, 405 U.S. 313, 315, 31 L.Ed.2d 258 (1972). It is clearly much more offensive to due process to hold that a litigant is bound by a statute or amendment not even in existence when he acted.

Second, the rationale of the Pennsylvania Supreme Court is defective because it presumes that Barnes and Tucker has a continuing or prospective involvement in the discharge from the mine. Such is not the case. While it is true that the gravity discharge is continuing (and in that sense prospective), there is no continuing activity by Barnes and Tucker. As

noted by the Commonwealth Court, "[F]actors of a present activity on the part of the owner or user of the land or of a course of conduct directly producing the deleterious result are absent in this case." (App. 65)

The second basis for holding Barnes and Tucker liable was the Pennsylvania Supreme Court's unusual application of nuisance law. First the Court overruled the long-standing case of *Pennsylvania Coal Company v. Sanderson, supra,* which held that acid drainage from a coal mine did not constitute a nuisance, (First Pennsylvania Supreme Court Opinion, App. 88), and passed over without consideration the finding of the Commonwealth Court that "The mine water discharge from Mine No. 15 after cessation of mining does not constitute a public nuisance under Section 3 of the Clean Streams Law as then in effect for which Barnes and Tucker is presently responsible." (App. 67). The Supreme Court presumed current harm to the waterways which the Commonwealth Court found to be already polluted by sewage and industrial waste (App. 65), and found sufficient public interest by reference to an Amendment to the Pennsylvania Constitution enacted subsequent to the time Barnes and Tucker ceased operations and sealed Mine No. 15–an Amendment which the Pennsylvania Supreme Court itself has held is not "self-executing" so as to allow the government to act against individuals. *Commonwealth v. Gettysburg Battle Tower Inc.*, 454 Pa. 193, 311 A.2d 588 (1973). Thus, the Pennsylvania Court held Barnes and Tucker liable forever in the future for actions consummated prior to adoption of legislation establishing any liability, and upon an alleged violation of a public interest created by a constitutional amendment adopted two years after the date Barnes and Tucker Company discontinued its mining activities.

The rule of *Lawton v. Steele*, 152 U.S. 133, 38 L.Ed. 385 (1894) establishing the proper constitutional standard for evaluating the propriety of a statute enacted under the police

power is still applicable law. To pass constitutional muster a regulation promulgated under authority of the police power must use "... means [that] are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." 152 U.S. at 137. Here the imposition of liability is unreasonable for there has been no opportunity for Barnes and Tucker to avoid the charged violation inasmuch as its mining activities were completed before the condition was declared unlawful. Moreover, the State has not advanced any sound reasons as to why a different rule of liability should be imposed upon the former operator of this particular mine than upon the former operators of the multitude of other abandoned mines which are draining into the same streams, and contribute by far the greatest part of the pollution. Accordingly, in order to adopt the most reasonable means of dealing with the problem, and to avoid an unduly oppressive result, the State has authority under P.L. 1075, 35 P.S. §760.1 et seq., to assume direct responsibility for the water discharged from Mine No. 15 in much the same manner as it has assumed responsibility for drainage from other abandoned mines.[3]

There is no doubt that the imposition of an open-ended liability upon Barnes and Tucker to continue to treat the waters flowing from the mine is a "taking" of property within

[3] It should also be noted that Pennsylvania has dealt with the deferred social cost of surface mining by Section 18 of the Pennsylvania Surface Mine Reclamation Act. P.L. 1198, 52 P.S. §1396.18 which creates a Surface Mine Conservation and Reclamation Fund funded by monies from currently active operations to reclaim surface mines abandoned before the date of the Reclamation Act. The new Federal Surface Mining Control and Reclamation Act of 1977, P.L. 95-87, sections 401 and 402, creates a reclamation fund to be derived from industry-wide assessments of 35 cents a ton on surface mined coal, and 15 cents a ton on deep-mined coal, to reclaim areas of abandoned coal mines, including the abatement of mine drainage from deep mines as well as from surface mines.

the meaning of the Due Process Clause. *Lawton v. Steele, supra.* Its effect is to create a negative worth factor in respect to inactive and sealed mines, and may very likely have the effect of discouraging the future development of mines to produce much needed energy, particularly where the coal deposits are in the vicinity of abandoned mines.[4]

The Pennsylvania Court's decision, if allowed to stand, could well become a legal precedent affecting other types of situations in which retrospective legislative action declares unlawful or in violation of the public interest conditions resulting from industrial activity which was in every respect lawful and proper under the laws in effect when the activity occurred.

The issues involved in this case are issues of the utmost gravity, affecting hundreds, and even thousands, of companies engaged in coal mining and other mining activities as well. Until these questions are answered mine managers will be unable to make operational decisions in an atmosphere unclouded by doubt as to their ultimate legal consequences, and each such decision will remain, in the words of the Melancholy Prince,

> *"sicklied o'er with the pale cast of thought;*
> *and enterprises of great pith and moment,*
> *with this regard, their currents turn awry."*

[4] Pennsylvania and the general Appalachian coal producing areas have thousands of abandoned underground mines. As of 1966, the United States Environmental Protection Agency estimated that there were approximately 67,613 abandoned coal mines in the United States which have a discharge flowing from them. U.S. Environmental Protection Agency, *Inactive and Abandoned Underground Mines, Water Pollution Prevention and Control* Table 1.01-1, p. 6 (1975).

For the foregoing reasons it is respectfully urged that the Court note probable jurisdiction to review the judgement from which this appeal is taken.

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JOHN L. KILCULLEN
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